competition rules under the Telecommunications Act of 1996[1] ("the Act" or "the 1996 Act"), almost two years ago, it has sought to open *local* markets to competition. Competitors, like the companies in the DATA coalition, have aggressively sought to bring competition for data services to consumers. As these comments demonstrate, many competitors are seeking to provide competitive and innovative high speed data services to small business and residential customers both in and outside urban areas.

Like the RBOCs, our ultimate success and survival depends on consumers' ability to obtain reliable, high speed data services through digital technologies such as DSL, including access to the Internet. Unlike the RBOCs, however, we do not seek a regulatory "safety net" for the development of our data services, and instead expect only the ability to fully and fairly compete in a vigorous data services market. Also unlike the RBOCs, we require access to monopoly loops of another carrier to provision our data services. The resistance and intransigence of incumbent local exchange carriers ("ILECs"), including the Petitioners in this proceeding, in providing access to DSL-capable loops and collocation has significantly slowed the deployment of these competitive alternatives.

The Petitions are in reality a Trojan Horse; while seeking relief from regulation of provision of Internet services, Petitioners also seek to undo fundamental protections against leveraging their monopoly power over collocation space and copper loops to give themselves an anticompetitive advantage for digital services, including DSL.

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 St. 56, codified at 47 U.S.C. §§ 151 *et*

The relief requested by the RBOCs—including Commission forbearance from their unbundling, resale and cost-based price requirements[2]—would stymie DSL competition, because it would remove the anticompetitive safeguards of the Act and reduce the incentive of the RBOCs to cooperate with competitors. DSL services depend on competitors' ability to obtain essential monopoly elements—in particular loops and collocation— from incumbents. The best way to ensure that advanced telecommunications services reach all Americans is to promote competitive alternatives, not to discourage them. Toward that end, the Commission must deny the relief requested by the RBOCs and take affirmative steps pursuant to the 1996 Act to promote competition and ensure that the ILECs are in fact complying with the requirements of the Act.

DISCUSSION

I. THE COMMISSION MUST NOT ACT TO JEOPARDIZE THE GROWING COMPETITION FOR DATA SERVICES

A. The Promise of Substantial Competition Is Developing For Data Access Services

One of the most exciting developments since the passage of the 1996 Act is the emergence of new and innovative data services, including DSL services to provide previously under-served markets with high speed data access. Over the last two years, this vision has increasingly become a reality. Numerous competitors have rushed to serve the high speed data market, including the companies in the DATA coalition. And a large number of these companies are providing services to

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under-served residential and suburban locations, and small and medium businesses.

The competitive providers of DSL services are targeting their services at all users, including—and in some cases emphasizing—the under-served residential and small business users who do not have high speed data alternatives today. The companies in DATA seek to enable these under-served customers to function on a LAN from remote locations, work from a remote office or access the Internet at high speeds. Indeed, DSL services are almost inherently targeted at residential and small business customers as much as large business customers, since large business customers typically have a host of high speed options that do not depend on copper.[3] Contrary to RBOC suggestions, in actuality competitors are not targeting, and will not target, solely downtown "business" or urban customers, leaving incumbents to serve residential and small business customers. *See* BA Pet. at 15; US West Pet. at 3.

B. Continued Vigorous Data Services Competition Depends on Participation in the Market by Competitors

The RBOCs have been very slow in rolling out their own retail DSL offerings, due at least in part to a strategic concern over cannibalization of their lucrative T-1 business services. DSL services achieve speeds equal to or greater than those available over a T-1 at a fraction of the price Petitioners charge their current business

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[2] Although DATA coalition members are not directly impacted by petitioners' request for relief from the Act's section 271 requirements, DATA opposes this request on the grounds that section 271 provides an important incentive for the ILECs to continue to meet their checklist obligations.

[3] High speed services are more readily available in urban business locations because in the ILEC networks, office buildings tend to sit on feeder lines directly and do not require use of distribution. Since distribution is what slows transmission speeds, the feeder is usually sufficient to handle the high speed data demands of large customers. In addition, ILECs offer high speed services, such as T-1s, that are attractive to large businesses, but impractical for small business or residential customers.

customers for T-1 service.[4] For the same reason, ILECs have been making every effort to discourage competitive providers of DSL services.

Thus, provision of DSL by CLECs is the primary reason that DSL and other services are finally being made available at all. Ironically, while DSL technology was initially developed by Bell Labs in 1968,[5] and while Bell Atlantic proposed to use DSL eight years ago in connection with its video dialtone proposal, no ILEC ever actually deployed DSL services before last year. Despite its publicly articulated plans to roll out its own DSL service since at least 1995, Bell Atlantic has not to date begun offering DSL services in its region. BA Pet. at 4. Given their knowledge of and access to the DSL technology, RBOCs could have been providing DSL services for thirty or more years, even before passage of the 1996 Act, but have chosen not to do so for their own business reasons. As one commentator noted, although high speed data technologies are available, "[g]iven current deployment plans and the expenses involved, however, widespread implementation of such systems appears to be significantly farther in the future."[6]

Only now, in response to the growing surge of competitive DSL and other digital offerings by *competitors*, have RBOCs sought to enter the DSL market. BA announced plans to roll out ADSL by the second quarter of 1998. BA Pet. at 12-18. Similarly, US West has only begun to offer service in parts of its region. US West Pet. at 24-25. Ameritech's DSL offerings are likewise only being "trialed" and full scale roll-out has yet to occur. Ameritech Pet. at 4, 33.

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[4] Indeed, many ILEC T-1s are actually provisioned using DSL.

[5] George T. Hawley, ADSL data: The next generation, *Internet Telephony* (Aug. 12, 1996) (www.internettelephony.com/archive/8.12.96/Features/feature2.html).

Thus, it is critically important that the Commission ensure the viability of non-ILEC data competitors. As always, entrepreneurs rush in where monopolists fear to tread.

Given the host of new data service competitors, like the companies in the DATA coalition, that are clamoring to serve users, including the residences and small businesses located both in and outside downtown areas, competitive provision of DSL services would be rolling out even faster if competitors could get loops and collocation easily from ILECs. However, as discussed below, because provision of DSL depends on obtaining suitable loops and the collocation necessary to obtain those loops from the ILECs, the ILECs' inability or failure to cooperate has severely constrained market deployment of DSL and other digital access services. The Petitions threaten this competition even more by seeking to fundamentally rewrite the 1996 Act to remove the requirement to unbundle these essential bottleneck facilities as well as the Act's other requirements designed to prevent anticompetitive abuse. The specific relief requested by the Petitioners would allow them to leverage their bottleneck monopoly control of loop and collocation facilities to anticompetitively disadvantage their DSL competitors, as explained below.

II. A VIBRANT DSL MARKET IS DEPENDENT ON ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. DSL Technologies Require Collocated Access To The RBOCs' Unbundled Loops

DSL competition is dependent on access to ILEC unbundled network elements. For competitors to provision DSL services they must obtain copper loops

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[6] Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, OPP Working

from the ILEC and must be able to collocate their equipment at the ILEC central office to make use of the unbundled loops, and CLECs must have access to this equipment to service their customers' needs. Thus, while access to unbundled copper loops is absolutely essential, a very real and growing bottleneck to the provision of DSL services is the ability to physically collocate at the ILEC central office. Gorosh Aff. at ¶¶ 8-10; Geis Aff. at ¶¶ 3-6.[7]

DSL services use the ILEC's unbundled copper loop in combination with equipment collocated by the service provider to provide broadband digital pathways capable of supporting both data and voice services. In order to provision a DSL line, equipment is placed at the customer premises, and the ILEC's copper loop facilities connect this equipment to equipment collocated in the ILEC central office. In order for DSL technologies to work, it is essential that a variety of facilities and services are made available. First, there must be a "clean" copper loop between the central office and the customer's premises. This means that the copper facility must be free of load coils and excessive bridge taps. The copper loop must also meet certain length requirements in order for customers to obtain the increased speed benefits of DSL, since DSL speed decreases as loop length increases. Such clean loops, of appropriate length, are "DSL-capable loops". Without the ILEC loop, and the ability to collocate so that competitors can access both ends of the loop, DSL services cannot be provided in competition with the ILECs. Second, there must be collocation space available to the DSL CLEC, and the ILEC must allow access to that space by

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Paper Series No. 29 (FCC Mar. 1997).

[7] Appended hereto as Attachment 1.

competitors. As described below, ILECs have erected barriers to both of these requirements.

B. Petitioners Have and Use the Ability To Deny Access To Essential Unbundled Elements and Collocation.

The RBOCs grossly mischaracterize and understate their anticompetitive potential to foreclose digital services competition.[8] As the RBOCs are fully aware, provision of DSL services depends on competitors' ability to obtain copper loops and collocation from the incumbent, which has a monopoly over *both* of these elements. Cable, satellite and wireless services cannot be used to provide DSL service, and are therefore irrelevant to determining whether the ILEC continues to hold monopoly control over an essential bottleneck element. Put another way, the existence of some data-capable competitors does not make it "okay", as the RBOCs suggest, to anticompetitively injure other competitors. As long as the RBOCs maintain monopoly control over loops and collocation, and also intend to provide retail services, they retain both the ability and incentive to act anticompetitively toward competitors. Unfortunately, as the following discussion demonstrates, DSL competitors have already been experiencing anticompetitive tactics at the hands of incumbent carriers.

Perhaps the biggest barrier to deployment of DSL technologies has been the severe space constraints placed on data providers seeking to physically collocate at

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[8] In support of their petitions, the RBOCs contend that they do "not have the same alleged anticompetitive potential or unfair or special advantages entering the . . . *high-speed data market*," because the "host of guarantees of competitors' access to Bell Atlantic's networks, erases any otherwise colorable concerns . . . ." BA Pet. at 20-21; *see also* US West Pet. at 35-6; Ameritech Pet. at 10-11, 18. Likewise, the RBOCs contend that for high-speed data services, like DSL, "there is no 'local bottleneck' issue in high-speed data services, as cable companies and wireless and satellite data

the central office. Without the ability to collocate, there is no possibility of provisioning DSL services because a competitor cannot obtain access to an unbundled loop, much less attach the necessary equipment to the central office end of the copper loop. The ILECs' current policies with respect to the recombination of network elements will only increase the pressure for physical collocation space.

One DSL provider has had approximately 15-20% of its collocation applications rejected for such "no space" reasons. The "space" problems seem to be exclusively related to ILEC insistence that collocators construct expensive cages and related infrastructure *prior* to placing DSL equipment in those offices. Indeed, in some of the offices in which there supposedly is "no space", the ILEC (Pacific Bell) has begun to provide DSL services—clearly indicating that there is indeed space in those offices for DSL central office equipment, but not room for collocation cage and related infrastructure. Because RBOCs are not themselves limited by the growing space constraints of physical collocation, the incumbent retail entity will never be told that space is unavailable.[9]

In addition, until the ILECs' cumbersome collocation practices—where collocation is not a process of connecting equipment but more like an architectural renovation project—are fundamentally changed, DATA members will never be able to collocate their equipment at true parity with the manner in which ILECs install DSL equipment in these offices for their own DSL services.

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providers today bypass local telephone networks altogether." BA Pet. at 21; *see also* US West Pet. at 48-49; Ameritech Pet. at 18.

[9] Moreover, the current model offered by ILECs for virtual collocation is largely inadequate for provisioning DSL services. DSL and other loop-based digital services require the installation of equipment, monitoring that equipment, and rapid physical access, which competitors cannot rely on ILECs to do in a competitive environment.

Collocation is not the only competitive roadblock raised by ILECs. Despite the Commission's explicit statement that "section 251(c)(3) does not limit the types of telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC," *First Report & Order*, ¶ 381, data providers have been limited in their ability to obtain the necessary copper loops to offer DSL services. For example, ILECs have resisted or refused to agree to allow DSL competitors access to existing copper facilities, insisting that loops are not assigned as a particular technology, such as "copper", and that any guaranteed access to copper loops would create undue administrative burdens. Thus, while the ILECs' retail DSL entity will have access to copper loops as needed, the competitors have no ability to control their access to necessary copper plant. Also unlike the RBOCs, competitors have no ability to test several loops in a binder group and select the best quality loop to provision their own DSL service. Indeed, they are given no opportunity to participate in the loop selection process or testing process at all, and are not even given the results of the ILECs' own tests.

The RBOCs have also refused to comply with the Commission's mandate that requesting CLECs need not "take the LEC networks as they find them," or the requirement that "in some instances . . . the incumbent LEC [must] take affirmative steps to condition existing loop facilities to enable requesting carrier to provide services not currently provided over such facilities." *First Report & Order*, ¶ 382. In this regard the Commission has concluded that "if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facilities, the

incumbent LEC must condition the loop to permit the transmission of digital signals." *Id.*

Despite this mandate, some ILECs generally insist that they will not condition basic loops for carriers seeking to provide DSL. As the ILECs deploy their retail DSL offerings, there is little question that they will make the effort to "clean up loops" for their own DSL services. Competitors should be able to obtain the same consideration.

The Commission very explicitly requires that ILECs provide loops for provision of DSL services. *First Report & Order* ¶ 382. Yet, it has been extraordinarily difficult for competitors to obtain these loops. For example, contrary to Bell Atlantic's direct statement, BA Pet. at 21, Bell Atlantic *does not* presently make DSL-capable loops available to CLECs anywhere in its service territory.[10] Paragraph 11.2.9 of the draft interconnection agreement that Bell Atlantic was negotiating from until at least February of this year specifically stated: "BA will make HDSL 4-wire, HDSL 2-Wire, and ADSL 2-Wire ULLs available to [the CLEC] no later than the date on which it makes such ULLs commercially available to any other Telecommunications Carrier in [the state being negotiated] . . . ."[11] Put more simply, that clause provides that each CLEC only has the right to be the *second* entity to obtain DSL-capable loops, but no CLEC can be the first, and therefore none will ever get the loops. Only after Bell Atlantic decided to offer its own retail DSL services were changes to this provision considered by Bell Atlantic.

[10] Bell Atlantic is providing premium (ISDN) unbundled loops which can be used by DSL providers, but are not as well-equipped as DSL loops for DSL service.

[11] Section 11.2.9, BA Draft Interconnection Agreement (Excerpt Appended hereto as Attachment 3).

Thus, in essence, competitors were prevented from obtaining DSL loops unless and until Bell Atlantic decided to provide DSL services itself. This was a clear violation of the 1996 Act and the Commission's rules and a impenetrable barrier to entry in Bell Atlantic's thirteen state region. Even today, the only carriers receiving DSL compatible loops from Bell Atlantic are those involved in a DSL trial.

As Bell Atlantic rolls out its own DSL service, DSL-capable loops will become increasingly available, but competitors should not be required to wait for an incumbent to deploy innovative services in order to be "permitted" by the ILEC to offer innovative services of its own. The ILECs' ability to "gate" competition in this way is directly contrary to national competitive policy generally, to pre-existing Commission law and policy, and the 1996 Act.

Competitors have also faced ILEC intransigence in working around Integrated Digital Loop Carrier ("IDLC"), a technology which is generally provisioned in part over copper and in part over fiber. This intransigence results in substantial delay, if not complete denial, of service to competitors customers seeking to obtain DSL services. The Commission specifically held that "[i]f we did not require incumbent LECs to unbundle IDLC delivered loops, end users served by such technologies would not have the same choice of competing providers as end users served by other loop types." *First Report & Order* at ¶ 383. Nevertheless, ILECs insist that competitors seeking to "work around" IDLC cannot have access to only the copper portions of the loop, for instance at the distribution point, but must work through a time-consuming Bona Fide Request ("BFR") process to obtain a [illegible] solution. To compound the roadblock, some ILECs insist that a *separate* BFR process

be negotiated for *each central office*. Likewise, ILECs have been reluctant to rearrange facilities to make copper plant available where a customer is provisioned via IDLC.

ILECs also insist on retaining the ability to deny DSL loop requests when a loop does not meet their specified technical parameters for the provision of DSL services. Thus, an ILEC can tell a competitive provider that no DSL compatible loop is available to serve a particular customer. Without some policing ability, such as resale, the ILEC could then turn around and provision that same end user with its own DSL service the next day.

ILECs also resist providing competitors with an explanation of why a DSL loop was denied. Without such information it is impossible for competitors to determine whether the loop that is available would indeed be suitable for their use. The lack of information similarly precludes a competitor's ability to suggest alternatives, such as rearrangement, that might enable them to provision service to a requesting end user customer, and even precludes the competitor from accepting a less-than-ideal loop. Similarly, ILECs can inform a competitor that DSL is available, but that it will take a long time or be very costly to access by requiring that such loops be obtained through largely open-ended Bona Fide Request processes.

III. THE FCC MUST INSIST THAT ILECS MEET THEIR UNBUNDLING OBLIGATIONS

The Petitions are filled with vague and varied requests for regulatory relief. However, at least two of the three Petitioners acknowledge that even if granted the relief sought, the RBOCs must still meet their obligation to unbundle the loops and

collocation necessary for competitors to establish DSL lines. US WEST, for instance, explicitly states that it

> is not asking here for complete deregulation of these technologies, *nor does it seek to avoid its obligation to make bottleneck facilities (such as local loops over which digital subscriber line services operate, or central-office collocation space)* available to its CLEC competitors. US West Pet. at 4 (emphasis added).

US West further offers to "continue to make unbundled conditioned loops and collocation space available at cost-based prices to ensure that competitive carriers can provide their own data telecommunications services to customers." US West Pet. at 5.[12]

Similarly, Ameritech recognizes and acknowledges its clear statutory obligation to continue to provide unbundled loops and collocation. Thus, like US West, Ameritech explicitly does *not* request that the Commission

> remove the section 251(c) unbundling and resale requirements from those local exchange facilities that may be used to provide both voice and data services. . . [Ameritech] does not suggest that it should not be required to offer collocation to data service providers for interconnection or access to unbundled network elements. Ameritech Pet. at 18.

But rather, Ameritech agrees to

> *continue to work with unaffiliated data service providers to ensure that they can interconnect with, and obtain unbundled access to, its local exchange facilities consistent with the requirements of section 251(c). Id.* (emphasis added).

[12] *See also id.* at 48 ("US West is not asking the Commission to remove the unbundling and resale discount requirements form the underlying "bottleneck" facilities that may be used in voice and data services alike.")

Presumably, these admissions by US West and Ameritech recognize the Commission's determination that ILECs must provide loops for provision of xDSL services. *First Report & Order*, ¶ 382.

As the Commission sorts its way through the many interrelated issues raised by the RBOCs, and feels its way through the sometimes miasmic prose of those filings, it must not lose sight of a critical disparity between the RBOCs' promises and today's harsh reality. Petitioners admit, as they must, that they have an obligation under Section 251 to enable competitors to provide DSL services through access to unbundled loops and collocation. Accordingly, Petitioners offer to continue to provide such access regardless of the outcome of these proceedings.

However, these blithe assurances do not, in any way, comport with the reality data providers are experiencing in the marketplace. As discussed above, and in the attached affidavits, despite the FCC's and Act's requirements, the ILECs can employ a variety of tactics to deny essential facilities to potential competitors for DSL services. As a result, DSL-capable loops are regularly "unavailable" to competitors. Similarly, DSL competitors are regularly rebuffed in their attempts to obtain collocation.

The Commission must first make it perfectly clear that with regard to DSL-capable loops and collocation, ILECs continue to be responsible for providing access on both an unbundled and resale basis. The Commission must also insist that the ILECs actually deliver on their obligation to provide access to unbundled loops and collocation. As discussed in more detail below, however, requiring the Petitioners to merely meet their existing unbundling obligations is an insufficient solution. In

addition, the Commission should deny Petitioners' request for forbearance from their section 251 duties for DSL-equipped loops (*see* Section IV) and further, take the affirmative steps outlined below to ensure competition in the fast-growing data services industry that will bring the benefits of advanced telecommunications services to all Americans.

IV. THE COMMISSION MUST DENY PETITIONERS' REQUEST FOR FORBEARANCE FROM DSL-EQUIPPED LOOPS AND SERVICES

A. Commission Forbearance Coupled With Existing ILEC-Imposed Limitations on Collocation Space and the Availability of DSL-Capable Loops Would Eliminate Competition

Petitioners seek forbearance from their obligation to offer data services such as DSL to competitors on a unbundled, resale and cost-based basis. BA Pet. at 3-4; Ameritech Pet. at 14 n.23, 33-35; US West Pet. at 44-52. Granting this request, however, would prevent competition in the digital services market in every single instance in which an ILEC "determines" that collocation space or DSL-capable loops are no longer available. Entire neighborhoods—those unfortunate enough to be served by IDLC or an allegedly "full" central office—would face no prospect for facilities-based, DSL competition that DATA members could provide. Such a result is *clearly* inconsistent with the goals of the 1996 Act and pre-existing Commission policy and precedent.

As explained above, DSL services require access to both a copper loop and collocation space. Without access to both of these essential facilities, new entrants are unable to compete. At the same time, however, collocation space, in particular,

is becoming more and more scarce. Gorosh Aff. at ¶¶ 8-10; Geis Aff at ¶¶ 3-6.[13] Competitors are already being told, and with increasing frequency, that loops are not available or collocation space does not exist at key central offices.

Therefore, should the Petitioners' request be granted—removing the RBOCs' obligation to unbundle, resell or set prices based upon the cost of the element—new entrants will eventually face the circumstance where one of these essential facilities is unavailable. At that inevitable point in time, no resale or unbundling recourse will exist for DSL services. Competitors will lack access to both the raw DSL-capable loop or collocation space and to the traditional alternatives of resold or unbundled DSL services or facilities. Thus, when an ILEC's central office space can accept no more collocation, or its DSL-capable loops are all accounted for, consumers will be deprived of all options and loop-based digital services will return to a one-company ILEC business.

B. ILECs Have the Incentive To Maximize the Unavailability Of Collocation Space and DSL-Capable Loops

To make matters worse, powerful incentives exist to encourage ILECs to make DSL-capable facilities unavailable with greater regularity. There currently exist no standards to define when a central office is full or when a loop is "clean." This uncertainty places an enormous amount of control into the hands of the incumbent provider. When competitors inquire about space availability in a given central office, there is no dispute resolution mechanism available to contest a response in the negative. Rather, competitors cannot even get ILECs to indicate which central offices still have room, or how much space remains open. Nor can they find out

[13] Appended hereto as Attachment 2.

how close a loop or loops are to being DSL-capable. New entrants must constantly play a guessing game with the ILECs in the hopes of eventually securing the basic tools necessary to compete.

Should the Petitioners request for forbearance from the unbundling, resale and cost-based pricing rules for DSL services and DSL-*equipped* loops be granted, the Commission will, in effect, provide a two-fold incentive to ILECs to increase the frequency with which collocation space and DSL-*capable* loops become unavailable. First, every time an ILEC denies a competitor access to its loops or central office, it will profit from the fact that its direct competitor is unable to participate in the market. Second, every such instance will provide the ILEC an opportunity to provide one of its own digital services free of competition.[14]

Because there is no effective way to prevent ILECs from distorting the true availability of their facilities, Commission forbearance would be the equivalent of granting a "free pass" for ILECs to move quickly to shut out alternative digital service providers and secure monopoly control, not just of the DSL-capable loops, but of the actual provisioning of DSL services.[15]

C. The Only Means to Prevent the Anticompetitive Effect Associated with Finite Collocation Space And Loop Availability Is to Deny Petitioners' Request For Forbearance And Insist on Full Compliance with Existing Law

The pro-competitive mechanisms from which Petitioners seek protection are the only means available to ensure that competition will flourish in the digital

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[14] Members of DATA have already seen instances in which an ILEC is providing DSL services from central offices at which it had denied collocation space to its competitors.

[15] It is unclear, in light of section 10(d), 47 U.S.C. § *160*(d), that section 706 even empowers the Commission to grant the requested relief for the RBOCs.

services marketplace. The DATA companies are regularly faced with unavailability of collocation and clean copper loops that a competitor can equip to provide DSL service—what we call a "DSL-capable" loop. In these situations, requiring the ILECs to unbundle and offer for resale the loops they have equipped with DSL capability—what we call "DSL-equipped" loops—will protect consumers from an ILEC monopoly on DSL services resulting from an ILEC bottleneck monopoly on loops and collocation.

As discussed above, there will be situations where, acting in good faith, the ILEC can demonstrate that, at a particular central office, there is no collocation space available, or that there are no "additional" DSL-capable copper loops available to unbundle for competitors to equip with DSL services. If, despite these claims, the ILEC is providing DSL services to consumers served out of that central office, then the ILEC has obtained a monopoly on DSL service from that office by virtue of its monopoly bottleneck control of loops and the central office space needed to access them.

Even in those situations, consumers should have the choice of providers and services guaranteed to them by the nation's antitrust laws, the Communications Act, FCC policy, and the 1996 Act. In those situations, the only way to provide that choice to consumers is to require the unbundling of ILEC DSL-*equipped* loops and the resale of ILEC DSL services. Given the numerous and growing instances in which collocation—and therefore unbundled loops—are "unavailable" to competitors, the requirements to unbundle and resell ILEC DSL-*equipped* loops and services is crucial to competition in this new field.

Requiring the unbundling of ILEC DSL-equipped loops and the resale of ILEC DSL services is important for additional reasons as well. While the ILECs may not be able to simply refuse to unbundle loops, they certainly believe they have the right to effectively refuse to unbundle loops where collocation space is unavailable and where there are no additional spare copper loops. The FCC and state commissions have not yet insisted that—to fulfill the promises of the 1996 Act—ILECs be required to modify their uses of precious central office space and remedy their current collocation practices much less provide additional loops for unbundling.

In addition, the ILECs—as evidenced not least by these Petitions—have finally decided to offer their own DSL services. Given these realities, the ILECs have the incentive and ability to minimize the availability of collocation and "spare" DSL-capable loops, thereby artificially advantaging their own DSL services and artificially disadvantaging competitive DSL services. The Commission has only to look at current market conduct to recognize that the ILECs have the same incentives and ability to anticompetitively leverage their bottleneck monopolies now as led to the historic antitrust case against the Bell System. Examples of creative and anticompetitive ILEC stratagems include: imposing novel and unnecessary "technical" requirements on what equipment can be collocated, Gorosh Aff. at ¶¶ 11-4; refusing to permit DSL CLECs to purchase *tariffed* services to their collocation cages, Gorosh Aff. at ¶ 10; and refusing to inform DSL providers of existing collocation options. Geis Aff. at ¶ 6.

Thus, where a competitor seeks access to DSL-capable loops or collocation, and is denied because of lack of availability, the Commission should require that the

ILEC provide unbundled DSL-equipped loops or DSL-extended links, as well as resale of the digital or DSL services the ILEC offers or is capable of offering. This will provide assurance that the ILECs will not benefit from their bottleneck monopolies and at a minimum, consumers will have choices in providers and services in this important field of new services and technology.

D. The Commission's Historical Policies and Decisions, Predating the Act, Require that Adequate Safeguards to Competition Be Maintained

As the Commission is well aware, effectively opening monopoly markets to competition is a long and difficult process. Incumbent monopolists have at their disposal a broad range of tactics and excuses designed to both thwart their competitors and free themselves from what they perceive as regulatory bondage. Yet, through a long history of dealing with competitive issues, the Commission has recognized that certain key tools are essential to enable competitors to overcome the barriers to entry posed by incumbents. The Commission has also seen that a failure to safeguard competition will forestall competition indefinitely.

The Commission's actions to promote competition pre-date the 1996 Act by almost forty years. In particular, throughout that time, the Commission has acted boldly to open-up bottleneck networks so as to permit competition. These actions have opened competition in markets ranging from CPE and inside wiring, interstate private line services, *MTS/WATS*, and enhanced services to *the Expanded Interconnection* proceedings.

This history specifically recognizes that where essential facility bottlenecks exist in a network, certain critical regulatory mechanisms are necessary to ensure the development of competition.

- The Commission has recognized that monopolists must not be permitted to use artificial restrictions, including tariff restrictions, and restrictions ostensibly based on technology considerations, to prevent competition that is technically feasible.[16]
- The Commission has long recognized that resale provides an important policing function against anticompetitive behavior. The Commission has determined that to the extent incumbents prohibit resale, they "restrict subscribers' use of their communications service, . . . [and] are discriminatory, and thereby unlawful."[17]
- The Commission has determined that where a monopolist retains control of an essential bottleneck facility, promoting competition requires that the incumbent be obligated to unbundle individual elements of the service it provides at retail. Thus, the Commission concluded in the ONA proceedings that it was "basic services must be available to other enhanced services providers and users under the same tariffs on an unbundled and functionally equal basis."[18]

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[16] *Decision*, FCC Docket 16942, "Carterphone" 13 FCC 2d 420 (June 26, 1968); *Hush-A-Phone Corp.*, 20 FCC 391, *order set aside, Hush-A-Phone v. US*, 238 F.2d 266 at 269 (D.C. Cir. 1956), *on remand* 22 FCC 112, (1957).

[17] *Report and Order*, "Resale and Shared Use," 60 FCC 2d 261 (July 16, 1976) at 263, *recon.* 62 FCC 2d 588 (1977), *aff'd sub nom.* American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 (2nd Cir. 1978) *cert. denied*, 439, 439 U.S. 875 (1978).

[18] Report and Order, "ONA Proceedings," 104 FCC 2d. 958, at 965 (May 15, 1986).

- Another, even older mechanism employed by the Commission to assure the growth of competition is to require that a monopolist's prices be set based on its incremental costs, and to prohibit monopolists from eliminating competition through below-cost predatory pricing. The Commission determined in the historic *TELPAK* decision that it was

> unable to find that the rates [AT&T proposed to counter competition in the private line field] are compensatory and that, in consequence, the discrimination is justified by competitive necessity . . . that the company is giving up more than it is gaining leads to the conclusion that, [AT&T's rates] have not been shown to be justified in order to meet competition and thus not burden other users, but to benefit them. Therefore, . . . the tariff . . . must be held to be unjustly and unreasonably discriminatory. *Tentative Decision*, "AT&T's TELPAK Service and Channels," 37 FCC 370 (March 18, 1964) at 394.

The Commission cannot simply disregard forty years of pro-competition policy or the numerous instances of anticompetitive behavior on the part of incumbent monopolists identified in those proceedings. The Commission's own history demonstrates the difficulty of developing competition from monopoly markets and provides numerous tools and mechanisms for policing anticompetitive conduct. Based on the Commission's pre-Act authority and policies, the FCC must take affirmative steps to promote competition for DSL services.

Moreover, the procompetitive measures historically employed by the Commission to manage the transition from monopoly to competitive markets are fully consistent with the provisions of the 1996 Act. Indeed, the Act's local competition provisions, including sections 251, 252, 271 and 272 are largely designed

to embody the regulatory tools and mechanisms this Commission has used historically to manage the development of competitive markets. Among other things, the Act requires that incumbents make unbundled network elements available at cost-based prices, ensures unrestricted resale, and provides for separate subsidiaries. Nothing in the Act precludes the Commission from continuing its long tradition of procompetitive action. Thus, the Commission should ensure that the procompetitive mechanisms, whether extensions of historical policies or statutorily-required, ensure that vibrant competition for DSL service can fully and rapidly be realized.

There are several steps the Commission should take to ensure and promote competition in advanced telecommunications services. These include:

- *Continue to require the ILECs to actually unbundle loops capable of supporting DSL ("DSL-capable" loops) and to make collocation space available,*

- *Require ILECs to reform their current collocation practices to facilitate DSL competitors in obtaining "blanket" collocation coverage in residential neighborhoods and business districts, including, for example, by permitting sharing, smaller cages, and other creative alternatives acceptable to competitors;*

- *Where either unbundled loops or collocation are unavailable, require ILECs to unbundle ILEC DSL-equipped loops and to resell ILEC DSL services;*

- *Subject the LECs' retail entities to a "first-come-first-served" regime for collocation space* so that they cannot add new equipment to central offices where competitors have been told no space is available;

- *Impose sanctions* on ILECs for obstructionist conduct, including delaying or denying OSS suitable for digital and data services, imposing repetitive, lengthy, and unilateral BFR processes,

questioning and delaying the placement of DSL central office equipment.

These pro-competitive steps would take the Commission much farther toward attaining the goals of telecommunications competition, especially for advanced services, than would the Petitioners' requests for extension of their monopoly control over bottleneck services. Given the Commission's long history of support for the promotion of competition in new telecommunications industries and the intent and purpose of the Act, the Commission's clear obligation is to do everything in its power to allow new entrants to compete and deliver the benefits of the open market to the consumers of advanced data services.

V. THE COMMISSION CANNOT GRANT THE RBOC PETITIONS, ON THE RECORD BEFORE IT, AND WITHOUT THE BENEFIT OF A FULL NOTICE OF INQUIRY

The RBOCs' Petitions are full of complex issues and unanswered questions. The information available to the Commission is insufficient to permit the Commission to grant the Petitions. Indeed, the Commission cannot build a record sufficient to support action in favor of the Petitions without, at a minimum, a full Notice of Inquiry ("NOI").

DATA suggests that an appropriate forum for this examination would be the Commission's upcoming Section 706 proceeding, required by Section 706(b) of the 1996 Act.

The Petitions raise many complex and important issues, yet obscure key facts and fail to provide other crucial information. Indeed, on some issues the RBOCs' Petitions are crafted to intentionally blur the distinctions this Commission must make in ruling on Petitioners' requested relief. For instance, it is unclear from the

Petitions whether the data networks they seek to develop to supplement the Internet backbone are distinct from their voice networks. Bell Atlantic specifically notes that a "packet-switched" network will relieve overcrowding on its voice network, suggesting that these networks would be *distinct* and used distinctly. Similarly, Bell Atlantic states that "[e]xpanded packet-switching capacity would allow data traffic to be re-routed onto such network in order to relieve the burdens on the local voice networks caused by increased use of on-line services." BA Pet. at 17.

Bell Atlantic's past public statements say just the opposite. For example, Bell Atlantic's Annual Reports and other public pronouncements reflect its intention to serve all its markets with a single "full-service" network.[19] "In fact, the same broadband network that we're building to serve the voice and data markets will also service the video market."[20] These statements reveal Bell Atlantic's intention to deploy all services, voice, data, Internet, video and others over a *single* broadband network. As Bell Atlantic's CEO Raymond Smith puts it, Bell Atlantic can enter new markets such as long distance, video and Internet access, "with our advanced network" with "very little incremental investment."[21]

> In short, our network strategy is to transport more information, in more forms, more efficiently, with higher quality and lower costs than any other network. Loading many revenue-generating services on the

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[19] Bell Atlantic 1995 Annual Report at 6.

[20] Bell Atlantic 1995 Annual Report at 10. Mr. Smith reiterated this strategy just over a year ago: "The end-game is building a switched broadband network in all our major markets—a network that can carry digital cargo in any form, efficiently, economically, and in a way that's transparent to customers." Speech of Raymond W. Smith, Bell Atlantic before the Institute of Public Utilities (Dec. 4, 1996).

[21] Bell Atlantic 1995 Annual Report at 7.